

**THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION**

**THE UNITED STATES OF AMERICA,)
ex rel. JOSEPH M. THOMAS,)**

Plaintiff,)

v.)

**DUKE UNIVERSITY, DUKE)
UNIVERSITY HEALTH SYSTEM,)
INC., WILLIAM M. FOSTER, PH.D.,)
and ERIN N. POTTS-KANT,)**

Defendants.)

Case No.: 1:17-cv-00276-CCE-JLW

**DUKE UNIVERSITY AND DUKE UNIVERSITY HEALTH SYSTEM’S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOW COME Defendants, DUKE UNIVERSITY and DUKE UNIVERSITY HEALTH SYSTEM, INC. (“Duke”), pursuant to Federal Rule of Civil Procedure 56 and LR 56.1, and move this Court for an Order granting partial summary judgment on claims asserted in Relator’s Amended Complaint. Specifically, Duke requests summary judgment on (1) Counts Four and Five of the Amended Complaint, and (2) Counts One, Two, and Three of the Amended Complaint to the extent they seek to impose liability for grants that did not report any false or fabricated data. The basis for this Motion is that, as to these matters, there are no genuine issues of material fact and the Defendants are entitled to judgment as a matter of law.

In support of this Motion, Defendants show unto this Court that:

1. This is an action brought by the Relator, Joseph Thomas, on behalf of the United States of America under the False Claims Act, 31 U.S.C. §§3726-3733 (“FCA”). Specifically, the Relator alleges that a research technician at Duke, Erin Potts-Kant, falsified data over a period of years which, in turn, was submitted in support of grants awarded by the United States.

2. Counts Four and Five of the Amended Complaint allege that every National Institutes of Health (“NIH”) grant awarded to Duke from June 2013 to the present, including grants that had no relationship to the alleged misconduct committed by Potts-Kant, were nonetheless procured by fraud—even though these grants contained no false data, had no connection to the relevant laboratory, and have resulted in scientific progress to combat human disease—because Duke allegedly falsely certified compliance with the “assurance” requirements set forth in 42 C.F.R. Part 93.

3. Duke is entitled to summary judgment on Counts Four and Five because the Relator cannot show that any alleged assurance violation was material under the FCA as a matter of law.

4. Counts One, Two, and Three of the Amended Complaint allege that Duke presented false claims for payment to federal agencies by including false data in grant applications and progress reports. This motion seeks summary judgment on two categories of grants for which there is no evidence that Duke reported false research results.

5. For the first category—the “non-falsity grants”—Relator has stipulated that he has not identified any false data in the relevant grant applications or progress reports and will not be pursuing any claims for these grants under Counts One, Two, and Three. A copy of this Stipulation is attached to this Motion as **Exhibit 1**.

6. For the second category—the “publication-only grants”—Relator has likewise stipulated that he has not identified any false data in the grant applications or progress reports. Instead, Relator claims Duke is liable for those grants under the FCA solely because the grant documents correctly cite to published journal articles which, in turn, contain allegedly false data or statements. A copy of this Stipulation is attached to this Motion as **Exhibit 2**. The truthful citation to a published article, even if the article is later found to have false data, is not a basis for liability under the FCA.

7. Duke has contemporaneously served two memoranda in support of this motion on opposing counsel and the Government in accordance with the Court’s order. D.E. 278.

WHEREFORE Duke University and Duke University Health System, Inc. pray that this Court:

- (1) Grant Duke University’s motion for partial summary judgment as to Counts Four and Five of the Amended Complaint;
- (2) Grant Duke University Health System, Inc.’s motion for partial summary judgment as to Counts Four and Five of the Amended Complaint;

- (3) Grant Duke University and Duke University Health System, Inc.’s motion for partial summary judgment as to Counts One, Two, and Three of the Amended Complaint to the extent they seek to impose liability for the “non-falsity grants” listed in **Exhibit 1**, at 5-7.
- (4) Grant Duke University and Duke University Health System, Inc.’s motion for partial summary judgment as to Counts One, Two, and Three of the Amended Complaint to the extent they seek to impose liability for the following “publication-only grants”, listed in **Exhibit 2**, ¶¶ 1(a)-(e).
- (5) Grant such other and further relief as the Court deems just and proper.

Dated: October 31, 2018

Respectfully submitted,

/s/ James P. Cooney III

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CERTIFICATE OF SERVICE

I hereby certify that the following counsel were served by e-mail on October 31, 2018:

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